

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

ORIGINAL

77-1438

United States Court of Appeals
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

against

RUSSELL BUFALINO,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT BUFALINO'S BRIEF

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Preliminary Statement

The defendant, Russell Bufalino, appeals from the judgment of conviction entered in the United States District Court for the Southern District of New York on October 21, 1977 after a ten day jury trial before the Honorable Morris E. Lasker. The defendant Bufalino and his co-defendants, Michael Sparber and Herbert Jacobs, were convicted under a two count indictment of conspiracy to use extortionate means to collect an extension of credit and using extortionate means to collect an extension of credit in violation of 18 U.S.C. Section 894. The Defendant Bufalino filed his Notice of Appeal on October 26, 1977.

Questions Presented

1. Whether the court erred in denying defendant's Motion for a Mistrial on the basis of prejudice arising from third party contact with jurors?
2. Whether the court erred in questioning jurors outside the presence of the defendant and his counsel?
3. Whether the court erred in not dismissing the indictment since the defendant was denied his right to a speedy trial?
4. Whether payment by the Government to the witness informant violated due process?
5. Whether the court erred in refusing to suppress the Nagra tapes and the testimony of Jack Napoli?
6. Whether the court erred in failing to instruct the jury that they must find that the defendant intended to instill fear in Jack Napoli in order to convict?

7. Whether the court erred when it in effect charged the jury that they must find an extension of credit?

8. Whether the court erred when in sentencing of the defendant, it relied on substantial misinformation in the presentence report?

9. Whether the court erred in imposing separate sentences for the conspiracy count and the substantive count of the indictment?

10. Whether there was sufficient evidence to sustain a conviction on either count of the indictment?

Statute Involved

18 USC § 894. Collection of extensions of credit by extortionate means

(a) Whoever knowingly participates in any way, or conspires to do so, in the use of any extortionate means

(1) to collect or attempt to collect any extension of credit, or

(2) to punish any person for the nonrepayment thereof, shall be fined not more than \$10,000 or imprisoned not more than 20 years, or both.

(b) In any prosecution under this section, for the purpose of showing an implicit threat as a means of collection, evidence may be introduced tending to show that one or more extensions of credit by the creditor were, to the knowledge of the person against whom the implicit threat was alleged to have been made, collected or attempted to be collected by extortionate means or that the nonrepayment thereof was punished by extortionate means.

(c) In any prosecution under this section, if evidence has been introduced tending to show the existence, at the time

the extension of credit in question was made, of the circumstances described in section 892(b)(1) or the circumstances described in section 892(b)(2), and direct evidence of the actual belief of the debtor as to the creditor's collection practices is not available, then for the purpose of showing that words or other means of communication, shown to have been employed as a means of collection, in fact carried an express or implicit threat, the court may in its discretion allow evidence to be introduced tending to show the reputation of the defendant in any community of which the person against whom the alleged threat was made was a member at the time of the collection or attempt at collection.

Statement of the Case

This appeal arises from the conviction of the defendant for a violation of 18 U.S.C. Section 894.

On October 26, 1976, the Grand Jury returned a two count indictment against the defendant charging him with violations of Section 894. After two adjournments of the trial date at the request of the Government because of the pregnancy of one of the witnesses and over the objection of the defendant, a trial date was set for August 1, 1977. (A9 to A25) On April 4, 1977, the defendant moved to suppress certain evidence including the testimony of Jack Napoli and the Nagra tape recordings. (A50 to A55) An evidentiary hearing on this motion was held on May 5, 1977 and on June 7, 1977, the court denied the defendant's Motion to Suppress. (A62 to A70)

At the conclusion of trial on August 10, 1977, the defendant along with his co-defendants was convicted on both counts of the indictment. On October 21, 1977, the Hon. Morris E. Lasker imposed upon Mr. Bufalino a four year prison sentence and a \$10,000.00 fine on Count I of the indictment (conspiracy), and five years probation and a \$10,000.00 fine on Count II. (A181) Defendant Jacobs re-

ceived a sentence of three years probation and a fine and defendant Sparber received a one year prison sentence and probation. All defendants appealed to this court from the judgment of conviction.

The facts relevant to this appeal are as follows:

In February of 1976, Jack Napoli, the chief Government witness, posing as a friend of the defendant, Russell Bufalino, obtained jewelry from the defendant, Herbert Jacobs, by giving Jacobs a bad check for \$6,000.00. (Tr. 62, 67) Napoli subsequently obtained additional jewels from Jacobs by continuing to pose as a friend of Russell Bufalino's. (Tr. 70, 73, 83) When Napoli failed to pay Jacobs for the jewelry, he testified that both the defendant Jacobs and the defendant Sparber threatened him. (Tr. 86, 90) After Jacobs told Napoli that he talked with Bufalino concerning Napoli's misuse of Bufalino's name, Napoli decided to arrange a meeting with Bufalino in Florida. (Tr. 92, 96). Napoli testified that after he met with Bufalino in Florida he called the FBI. (Tr. 101) Napoli then testified about a number of conversations with the defendants and particularly about a conversation that he had with the defendant Bufalino on April 12, 1976 at a restaurant in New York City. During this conversation, Napoli had on his person a Nagra tape recorder and a K.E.L. transmitter which transmitted the conversation to recorders operated by the FBI. (A64, Tr. 120-122) Although the tape made on the Nagra recorder (parts of which were inaudible), was introduced into evidence, the tapes made from the K.E.L. transmitter were deliberately destroyed by the FBI. (A65; [Suppression Hearing Transcript, hereinafter Hr. Tr.] Hr. Tr. 80) This conversation of April 12, 1977 contains the only alleged explicit threat made to Napoli by Bufalino.

Napoli agreed to cooperate with the FBI in exchange for their promise to intercede on his behalf with respect to criminal charges that were pending against him and to place him, his girlfriend and her children in the Witness

Relocation Program. (Tr. 59) While in this program for a period of approximately fifteen months, Napoli received over \$46,000.00 in money and benefits. (Tr. 486) Napoli while in the custody of the U.S. Marshals under this program, defrauded the Government and a number of innocent individuals. (Tr. 60, 416-417, 666-667) The Government did not prosecute Napoli for his criminal activity while in the program.

During the trial on these charges, the jurors complained and were "quite nervous" about being approached, glared at and followed by certain spectators. (A84) The judge examined all jurors outside the presence of the defendant and counsel. (A83 to A112) During the course of the examination, one juror answered affirmatively when asked if anything happened which might influence her verdict (A89), and one juror gave an equivocal response when asked this question. (A97-A98) At the conclusion of his examination of the jurors, the trial judge concluded that no prejudice was caused by the incident and denied the defendant's Motion for Mistrial. On August 10, 1977, the jury returned a verdict of guilty as to all defendants on both counts of the indictment. The defendant moved for judgment of acquittal at the conclusion of the Government's case (Tr. 666), at the conclusion of trial (Tr. 832) and after the verdict (Tr. 1031). All motions were denied by the court below.

Sentencing for the defendant Bufalino was scheduled for October 21, 1977. On October 20, 1977, counsel for Mr. Bufalino was permitted for the first time to examine an extensive presentence report that contained many allegations of criminal activities without any factual basis and unsupported by criminal conviction. (A171-A172) The defendant specifically objected to the contents of the report on the form provided by the probation office and at the sentencing. (A173, A175) The sentencing judge referring to organized criminal activity and alleging without any

support from the record that the record showed that the defendant was dealing in stolen diamonds (A179-A180), sentenced the defendant to a term of imprisonment of four years, a sentence substantially more severe than that given to either co-defendant.

POINT I

The Court erred in denying defendant's motion for a mistrial on the basis of prejudice arising from third party contact with jurors.

This issue is founded on the activity of certain spectators during the course of the trial. The activity as described by the jurors consisted of following, glaring at, and talking with jurors concerning the case. The problem was specifically referred to briefly during the first day of trial when the U.S. Attorney observed that "spectators were making loud comments out in the hall in the presence of jurors". (A79)

Attention again was focused on the problem when the Deputy Clerk advised the Court that the jurors were "quite nervous" about the way spectators were glaring at them and following them around. (A84) Thereafter, the judge individually questioned each juror outside the presence of the parties and their counsel. (A88-A101) Both before and after the voir dire by the court, the defendants moved for a mistrial on the basis that the contact with the jury prevented a fair trial. (A85, A109) The Court denied these motions. The investigation conducted by the trial court revealed that nine of fourteen jurors questioned either remarked about the activity of the spectators or participated in a discussion with other jurors concerning these spectators.

In reviewing the examination of the jury by the court, it is apparent that there was a concerted effort on the part of some spectators to make contact with the jurors

in an attempt to influence their verdict. In most cases, the contact was not by verbal communication, but rather by actions and looks. Therefore, the extent of the contact is somewhat difficult to determine from the record. However, the conduct of the spectators was serious enough to cause the court to comment, "I have been myself unhappy by the tone as set by the presence of some persons in the audience." (A84) The trial judge described the spectators in question as "husky and menacing-looking people in the eyes of some who have not seen such people before". (A86) This description is important since it appears that although the actual words spoken by the spectators contain no explicit threat to the jury, an attempt to threaten, intimidate or otherwise influence the jury may certainly be inferred taking into account the physical appearance of the spectators as described by the court and the fact that they not only attempted to talk to the jurors concerning the case, but continuously glared at them and followed them.

The Deputy Clerk described the effect of this contact on the jurors when she reported to the court that:

"The jurors called me into their room and they said they are quite nervous. They seemed to, every time they go in or out, a couple of spectators are glaring at them. They said no matter where they went, they keep bumping into these people, elevators, outside." (A83-A84)

The actions of the spectators were noticed by the Government's prosecution team and the Government's chief witness. (A85) In fact, the U.S. Attorney thought the matter serious enough to request that the jury be sequestered stating, "We have to do something to safeguard the jury from any future contact". (A110) Taking into consideration the fact that the charge being tried before the jury involved an alleged concerted effort to intimidate and

frighten an individual by both explicit and implicit threats, the danger that the activity described seriously prejudiced the jury cannot be ignored.

In *Remmer v. U.S.*, 347 U.S. 227, 229 (1954), the Court stated:

"In a criminal case, any private communication, contact or tampering directly or indirectly with a juror during trial about the matter pending before the jury, is deemed presumptively prejudicial . . . the *burden rests heavily upon the Government* to establish after notice to and hearing of the Defendant that such contact with the jury was harmless to the Defendant." (Emphasis added)

(See also *U.S. v. Brasco*, 516 F. 2d 816 (CANY 1975).)

It is submitted that in the instant case, the conduct of the spectators specifically in attempting to start conversations with the jurors concerning the case, glancing menacingly at the jurors and shadowing the jurors comes within the scope of "private communication, contact or tampering direct or indirect", as stated in *Remmer*, *Supra*. (See *U.S. ex rel. Moore v. Fay*, 238 F. Supp. 1005 (DCNY 1965), where the court stated that shadowing of the jury is a type of activity which carries with it the presumption of prejudice). Certainly, the contact related to nothing other than the matter pending before the jury. Two of the jurors, Ms. Henry and Mr. Coleman, specifically testified that the spectators approached them and started conversations concerning the case (A89 & A93). A number of jurors complained about the way certain spectators glared at them as they entered and left the jury box. Even the judge associated the spectators with the defendant (A86) and from his interrogation concluded that the jurors also associated the spectators with one or more of the defendants. (A109, A164-A165)

The conclusion is inescapable that contact was made with the jury and that contact related to the matter pending before the jury thereby under *Remmer*, Supra, raising the presumption of prejudice.

The issue then presented is whether as a result of the examination of the jurors by the judge, the Government met the heavy burden necessary to rebut the presumption of prejudice. (*Remmer*, Supra at p. 229).

The strength of the presumption of prejudice which attaches to third party contact with jurors was recently examined by the 6th Circuit Court of Appeals in the case of *Krause v. Rhodes*, No. 76-1095 U.S. Court of Appeals for the 6th Circuit decided September 12, 1977, wherein the court stated:

"It was established in *Remmer*, Supra, 347 U.S. 229, that at least in criminal cases, any outside contact with a juror about a pending case made during trial is presumptively prejudicial and that the burden of establishing harmlessness rests heavily on the Government. This presumption has been consistently recognized by this court. In *Stone v. U.S.*, 113 F. 2d 70 (6th Cir. 1940) a case which involved an attempt to bribe a juror, the trial judge first interrogated the juror who had been approached in chambers with a court reporter recording the proceedings. He then asked the remaining jurors individually and under oath whether they had been approached or any unusual events had occurred in connection with their service on the jury. The first juror stated that he had told no one else of the approach, that as far as he knew, no other juror had been approached and that he was open-minded and able to decide the case as if he had not been approached. All the remaining jurors stated that they had not been contacted and that nothing unusual had occurred. Nevertheless, this court held that the presumption of prejudice had not been overcome since

there was no showing on the part of the appellee that no injury could have occurred by reason of the irregularity."

This presumption is not always rebutted by the assurance of the juror contacted that he could nonetheless render a fair and impartial verdict. *U.S. v. Rakes*, 74 F. Supp. 645 (1947).

In *Stone v. U.S.*, 113 F. 2d 70 (6th Cir. 1940), the Court of Appeals rejected the trial court's finding of no prejudice based upon the juror's assurance that the contact would not influence his ability to render a fair verdict, by stating:

"Jurors are human and not always conscious to what extent they are in fact biased or prejudiced and their inward sentiments cannot always be ascertained." (*U.S. v. Stone* at page 77)

In *U.S. v. Ferguson*, 486 F. 2d 968 (6th Cir. 1973), a juror was excused by the court because of a brief conversation he had concerning the case with a friend of the defendant. The excused juror prior to his dismissal related that contact to a second juror on the case by the name of Hamilton. Although when questioned by the trial court Hamilton stated that his conversation with the excused juror would in no way affect his decision in the case and despite the trial court's finding that the conversation in question was innocuous and not prejudicial, the Circuit Court reversed the conviction holding:

"Although Hamilton assured the Court that he still had an open mind on the case and we have no reason not to believe that he made that statement honestly, we cannot ignore the fact that jurors are human beings subject to the same suspicions perhaps subconsciously as all other persons." (*U.S. v. Ferguson* at page 972)

In *Ferguson*, *Supra*, the Court emphasized that the presumption of prejudice is a difficult one to overcome, when

in response to the Government's argument that the remarks in question were innocuous, harmless and not injurious to the appellant the court stated:

"Nevertheless, we are faced here with undisputed facts that a juror was improperly contacted from an outside source and that before being excused, he improperly discussed the case with at least one other juror if not more. Under the circumstances, it can hardly be said that the presumption is overcome. *As indicated, the presumption although rebuttable, is a rigid one because of its importance in protecting the jury system.*" (Emphasis added)

Even if this court were to accept the testimony of those jurors who assured the court they were not influenced by the spectators as being conclusive on the issue of prejudice, at least two of the jurors questioned did not respond to the Court's inquiry in such a manner so that the Court could assume they were not prejudiced by the incident.

Ms. Henry, the forelady of the jury, was the most vocal in her complaints about the conduct of the spectators. When the trial judge interrogated Ms. Henry he asked if anything occurred which would influence her ability to decide the case fairly. Ms. Henry gave an affirmative response describing her contact with the spectators. (A-89) The trial judge then for the second time asked "have they influenced you in any way?". Again, the juror did not assure the court that she was not influenced, but rather responded, "I am for law and peace". (A89) The Judge did not pursue the matter further but merely asked if she were fearful to which she responded she was not.

It is submitted that this juror's affirmative response to the court's initial question and unresponsive answer to the court's second question were not sufficient to meet the heavy burden necessary to rebut the presumption of prejudice as required by the Supreme Court in *Remmer*, Supra.

Rather, these responses at the very least indicated the probability of prejudice on the part of this juror. The juror's testimony that she was not fearful does not dispel the probability of prejudice since although this juror may not have been so fearful as to be unable to render a verdict of guilty, there is nothing of record to show that the contact of which she complained had not made her so angry or resentful as to be unable to render a verdict of not guilty.

In questioning the juror Ortiz, the Court asked:

"Q. Is there anything that happened that would affect your judgment?

A. No. When we go in and out they start staring in some way that we don't like." (A97-A98)

The court ended its questioning of Ortiz at this point and did not further pursue her comment. The answer given by the juror is not clearly negative. It is impossible to determine from the record that the juror meant by her answer that the stares mentioned would not affect her judgment. This at best equivocal answer is insufficient to rebut the strong presumption of prejudice.

The question to be answered in determining whether the contact with the jury required the granting of a new trial is not whether any prejudice actually was shown but rather whether the incident complained of created a condition from which prejudice might arise. (*Stone v. U.S.*, Supra at page 77)

In the often cited case of *Mattox v. U.S.*, 146 U.S. 140, 150 (1892), the Supreme Court held:

"Private communications, possibly prejudicial between jurors and third parties or witnesses or the officers in charge are absolutely forbidden and invalidate the verdict, at least *unless their harmlessness is made to appear.*" (Emphasis added)

The failure of the voir dire by the trial court to demonstrate the "harmlessness" of the contact with respect to each and every juror requires the granting of a new trial since the possibility of an improper influence on a single juror renders the verdict as unfair as if all of the jurors were improperly influenced. *Stone v. U.S.*, Supra at page 77.

It is submitted that in the instant case, the inquiry conducted by the trial judge falls far short of showing the harmlessness of the contact. The inadequacy of the trial judge's voir dire will be explored in more detail in a subsequent portion of this brief. Suffice it to say that although a number of jurors admitted discussing the activity of the spectators among themselves, the court never inquired as to the content of that discussion or as to whether any juror participating in or overhearing such a discussion was prejudiced thereby. In addition, despite the trial court's conclusion that the jurors associated the spectators with one or more of the defendants (A109, A164-A165), the court never specifically asked any juror if they associated the spectators with the defendants and whether that association would prejudice their ability to decide the case fairly.

This court cannot consider the effect of the contact with the jury in a vacuum. The probability of prejudice is greatly enhanced when, as stated previously, the case the jury is hearing involves much testimony about both explicit and implicit threats to a Government witness which witness is placed on a Government program under which his identity must be changed and he must be relocated in order to protect him from the defendants. In view of the nature of the case the jury was hearing and the nature of the contact in question, the trial court was compelled to conduct a more thorough examination into the question of prejudice. As it stands, in view of the response given by the jurors to those questions asked and in view of the trial court's failure to ask certain

questions crucial to a determination of prejudice, the harmlessness of the contact has not been made to appear and the presumption of prejudice must stand.

Although there are a number of cases in the 2nd Circuit wherein this court affirmed the trial court's determination of no prejudice, those cases are distinguishable from and not controlling on the case at bar. This is not a case dealing with "fleeting remarks of newsmen" as in *U.S. v. Kahane*, 317 F. 2d 459 (2nd Cir. 1963), nor is it a case where trial counsel did not request an interrogation of the jurors and the facts of record reveal nothing more than "unknown and uncompleted contacts" as in *U.S. v. Gersh*, 328 F. 2d 460 (2nd Cir. 1964) nor is it a case where the jurors questioned did unequivocally deny that the contacts would in any way affect their judgment as in *U.S. v. Miller*, 381 F. 2d 529 (2nd Cir. 1967).

In conclusion, the circumstances of this case bring it within the ambit of *Remmer v. U.S.*, Supra, thus raising the presumption of prejudice. Since the investigation by the trial court did not elicit facts sufficient to meet the heavy burden necessary to rebut that presumption, a new trial must be granted.

POINT II

The Court erred in questioning jurors outside the presence of the defendant and his counsel.

Although it is the position of the defendant that the facts of record show a significant possibility of prejudice arising from spectator contact with jurors so as to require a new trial, if this court should disagree, it is then submitted that the possibility of prejudice was not sufficiently examined by the trial court and since the trial court erred both in the method and content of his interrogation of the jury, a new trial should nonetheless be granted.

When the possibility of contact with the jury was brought to the court's attention, he questioned each juror individually, on the record, but outside the presence of the parties and their counsel.

This procedure violated the defendant's right under Rule 43 of the Federal Rules of Criminal Procedure to be present at every stage of the proceeding. In *U.S. v. Glick*, 463 F. 2d 491, 493 (2nd Cir. 1972), this Court held:

"It is clear to us at the outset that the private communications between the Judge and the jury violated the unequivocal mandate of Rule 43 which required the Defendant to be present 'at every stage of the trial'."

Although the communication referred to in *Glick*, *Supra*, involved the judge's ex parte response to a jury's questions, the requirement of Rule 43 has been held to apply in cases where the Judge is investigating possible third party communications with the jury. *U.S. v. Berger*, 433 F. 2d 680 (2nd Cir. 1970); *U.S. v. Baca*, 494 F. 2d 424 (10th Cir. 1974).

In *Remmer v. U.S.*, *Supra* at page 229, the Supreme Court emphatically described the procedure to be used by a trial court in this type of case, stating:

"The trial court should not decide and take final action ex parte on information such as was received in this case, but should determine the circumstances, the impact thereof upon the jurors and whether or not it was prejudicial in hearing *with all interested parties* permitted to participate." (Emphasis added)

It is admitted that the failure of the trial court in this regard is subject to the harmless error rule absent a showing of prejudice. *U.S. v. Berger*, *Supra*; *U.S. v. Glick*, *Supra*. However, such is not the case here.

In the instant case, the prejudice has resulted from the court's determination that a mistrial was not warranted,

absent an adequate interrogation of the jurors to rebut the presumption of prejudice which attached to such contact with the jurors. *Remmer v. U.S.*, Supra at page 229.

If the defendant and his counsel along with the U.S. Attorney had participated in the voir dire of the jury, there would have been a more thorough and accurate exploration of the facts and the trial court would have been in a more advantageous position to determine the merits of the defendant's Motion for Mistrial.

Perhaps the most obvious shortcoming of the trial court's interrogation is that although nine of fourteen jurors questioned gave some positive response either to the extent they experienced some disturbing contact with spectators or they discussed the matter with jurors who had such an experience, the judge failed to ask any of the jurors if they associated the actions of the spectators with any of the parties in the case. The court's failure in this regard is especially disturbing since the judge not only associated these spectators with the defendant Bufalino (A86), but believed the jurors made the same association. (A109)

Ms. Henry, when questioned and referring to one of the spectators said, "I saw where he was coming from and I hushed up immediately." (A89) The Court made no further inquiry on this matter to determine if Ms. Henry meant that she saw the spectator coming from the company of one of the defendants.

Both the forelady, Ms. Henry, and the juror Coleman testified they discussed this matter with the other jurors. Ms. Henry stated she "brought it to the rest of the jurors' attention" (A89) and Mr. Coleman testified he "warned" the rest of the jurors about the spectators. (A94) Mr. Valentine apparently overheard some of these discussions and was so disturbed by them that he suggested that the jurors bring it to the attention of the court. (A95)

Despite these admissions, the trial judge never questioned Mr. Valentine or the remaining jurors as to the content of the comments made by Ms. Henry or Mr. Coleman and whether those comments or any other comments made by other jurors affected their ability to render a fair verdict in this case; nor did the judge admonish the jurors not to discuss the matter further.

As stated previously, two jurors, Ms. Henry and Amparo Ortiz gave some affirmative response to the court's inquiry as to whether they would be influenced by the activity of the spectators. Despite those responses, the court abruptly terminated its interrogation and did nothing to further explore this possibility of prejudice.

Finally, on at least two occasions, the trial court's interrogation seemed less than objective, perhaps suggesting to the jurors the answers he expected to receive. In questioning Mr. Krieger, after Mr. Krieger had given a somewhat equivocal response to the judge's inquiry concerning the actions of the spectators, the judge interjected his opinion that the circumstances did not warrant taking any action.

"Q. Some members of the jury had been present when spectators have made statements which in my opinion don't warrant taking any action. I want the facts. That has not happened in your case?"

A. Correct." (A94-A95)

In questioning Ms. Sledge, the court asked a crucial question in a leading manner.

"Q. There is nothing that happened that would influence your judgment in this case in any way, is there?"

A. No." (A96-A97)

An application of the adversary system allowing full participation by all parties would have caused the judge to

be more thorough in his investigation and more careful in his manner of questioning. In this case the defendant was prejudiced in that he was denied the protection afforded by our adversary system of justice and a full and complete hearing into an incident which presumptively prejudiced the jury. (*Remmer v. U.S.*, Supra)

This court has stated that in absence of an examination designed to elicit answers which provide an objective basis for the court's evaluation "merely going through the form of obtaining jurors' assurances of impartiality is insufficient (to test that impartiality)". *U.S. ex rel. Bloeth v. Denno*, 313 F. 2d 364, 372 (2nd Cir.) Cert. Denied 372 U.S. 978 (1963)).

In *Silverthorne v. U.S.*, 400 F. 2d 627, 628 (9th Cir. 1968), the appellate court criticized the voir dire of the trial court stating:

"Each and every juror in the case before us had read or heard something about appellant's case. The trial court made no effort to ascertain what information the jurors had accumulated and consequentially had no way of objectively assessing the impact caused by this pre-trial knowledge on the jurors' impartiality."

In the instant case as previously stated, the trial court made no effort to determine what the jurors had discussed about the spectators and therefore had no way of objectively assessing the impact of those discussions. The trial court was apparently satisfied with each juror's general assurance of impartiality, an assurance deemed insufficient by this court in *U.S. ex rel. Bloeth v. Denno*, Supra.

Although counsel for the defendant did not specifically object to the procedure used by the court in questioning the jurors, it is submitted that the defendant by moving for a mistrial immediately upon learning of the incident (A85), again after the voir dire of the jury by the court (A109)

and again after reviewing the transcript of the voir dire of the jury by the court (A115) and by requesting an examination of all of the jurors immediately upon learning of the incident (A87) and again by requesting an examination of the two alternates immediately prior to their dismissal (A159), sufficiently preserved his right to make these arguments on appeal. Where there is a presumption of prejudice, it is not error for the defendant to rely on that presumption by moving for a mistrial without requesting further investigation of the matter. Since the burden is on the Government, it is the obligation of the trial court to order a complete and thorough inquiry in an attempt to rebut the presumption of prejudice and avoid a mistrial.

The 9th Circuit Court of Appeals in the case of *Silverthorne v. U.S.*, *Supra*, at page 641 stated: "

"When the defendant moves for a mistrial because of adverse publicity, he may, consistent with the preservation of the denial of that motion as error, decline an offer of the court to question the jurors relative thereto . . . under the circumstances, there was a rebuttable presumption that the rights of the appellant were prejudiced. The district judge should have taken such steps as were considered necessary by him to rebut that presumption and if not convinced that the presumption had been rebutted to have declared a mistrial."

In the instant case, the defendant properly raised the issue of prejudice by moving for a mistrial. Thereafter, the investigation conducted by the court into the issue of prejudice was both procedurally and substantively insufficient to rebut the presumption of prejudice thereby requiring a new trial.

POINT III

The Court erred in not dismissing the indictment since defendant was denied his right to a speedy trial.

Defendant was indicted on October 26, 1976, and arraigned on November 4, 1976. At the pre-trial conference on November 18, 1976, a trial date was set for March 28, 1977. On January 20, 1977, the Government requested an adjournment of the trial because the U.S. Attorney requesting the adjournment learned during the week of January 10th that the witness, Mrs. Napoli, was expecting a child on March 29, 1977, and she would be unable to travel for six weeks thereafter. The U.S. Attorney also stated in the affidavit that Mrs. Napoli's testimony was essential and that she would testify concerning an unrecorded meeting between her husband and the defendants, Michael Sparber and Russell Bufalino. (A9 to A11).

On February 11, 1977 the trial judge set May 31, 1977 as the new trial date. (A13). The Government filed its Notice of Readiness for Trial on March 4, 1977 stating it would be ready for trial on or after May 15, 1977. (A14).

The Government then requested an adjournment on May 16, 1977 because of Mrs. Napoli's internal hemorrhaging caused by the birth. (A15-A19). On June 6, 1977 the trial judge set August 1, 1977 as the new trial date. (A-25)

The Government violated the Speedy Trial Act in that defendant was not brought to trial within one hundred eighty days after arraignment. 18 U.S.C. Section 3161 (c), (g).

Under 18 U.S.C. Section 3161 (h) (3) (a), delay resulting from the absence or unavailability of an essential witness is not included in computing the time within which the trial must commence. An essential witness is unavailable "whenever his whereabouts are known but his

presence for trial cannot be obtained by due diligence". 18 U.S.C. Section 3161 (h) (3) (b).

The Government knew or should have known on November 18, 1976, that Mrs. Napoli was pregnant. Since trial could have been scheduled within the one hundred eighty day period without the risk of harm to the health of the witness, the Government should not have been allowed to wait until January 20, 1977 to request an adjournment. If due diligence were exercised by the Government, the trial could have been held within the period encompassed under the rule.

Even though the sanction provisions under 18 U.S.C. Section 3162 are not in effect, the indictment in this case should be dismissed under the reasoning of *U.S. v. Carini*, 562 F. 2d 144 (2nd Cir. 1977), where the court stated at page 148:

"We believe that under the circumstances here the violation of the Speedy Trial Act is a proper factor to be weighed in our analysis of whether Carini was denied his constitutional right to a speedy trial."

As stated in *Barker v. Wingo*, 407 U.S. 514, 521, 33 L. Ed. 2d 101 (1972), the four factors to determine whether a defendant's Sixth Amendment right to speedy trial was violated are length of delay; reason for delay; prejudice to defendant; and whether or not there has been a waiver by defendant.

Defendant was indicted on October 26, 1976 and trial commenced on August 1, 1977. This delay was in no way caused by the defendant, and under the particular circumstances of this case, the length of time was excessive. *U.S. v. Roberts*, 515 F. 2d 642 (1st Cir. 1975).

The reason for the delay was ostensibly the pregnancy of Mrs. Napoli. However, the case could have been tried well before the time Mrs. Napoli was expected to deliver. The affidavit of the U.S. Attorney requesting the adjourn-

ment stated that Mrs. Napoli's testimony would be essential. When Mrs. Napoli did testify, she was unable to identify the defendant, Russell Bufalino. (Tr. p. 541)

Not only was the defendant prejudiced by the Government's inexcusable lack of knowledge concerning the condition of Mrs. Napoli, but he suffered the "societal pressures of a public accusation of criminal conduct". *U.S. v. Vispi*, 545 F. 2d 328, 335 (2nd Cir. 1976).

For the above reasons, we submit that a dismissal of the indictment should also have been granted under Federal Rules of Criminal Procedure 48 (b).

The Government also violated the Southern District's "Plan for Achieving Prompt Disposition of Criminal Cases". According to Paragraph 7, the Government must be ready for trial within one hundred eighty days from the date of the filing of the formal charge. Under Paragraph 10, a period of delay is excluded if evidence material to the Government's case is unavailable and the prosecuting attorney has exercised due diligence to obtain the evidence and there are reasonable grounds to believe the evidence will become available within a reasonable period.

Paragraph 11 (c) of the "Plan" places a burden on counsel for the Government and defense to notify the court of possible scheduling problems.

In *U.S. v. Cacciatore*, 487 F. 2d 240 (2nd Cir. 1973), at a pre-trial conference on August 14, 1973, trial was set for August 17, after the Government filed its Notice of Readiness on August 6th. The Notice stated that the Government would be ready for trial after September 1, 1973. The court stated at page 244:

"Here it is true that on August 6, when Government counsel received the notice of pre-trial conference to be held August 14, he knew that one of his four witnesses was scheduled to go on annual leave on August

13 and that another was scheduled to enter the hospital on August 19. Government counsel should have communicated that information promptly to the judge so that one of the several alternatives might have been utilized to accommodate the Government's witnesses and still have permitted an expeditious trial."

The court denied defendant's motion for dismissal because under the circumstances of the case, a request by the Government for a two week adjournment date did not usurp the court's responsibility for setting the trial date.

There was no indication in this case the trial could not have been set within the six month period because of a congested court calendar. *U.S. v. Atkins*, 503 F. 2d 500 (2nd Cir. 1974); *U.S. v. Sanchez*, 392 F. Supp. 507 (S.D.N.Y. 1974).

If the Government cannot be held to have had actual knowledge on November 18, 1976 of the unavailability of the witness for trial on March 28, 1977, the Government should have known this fact or at least was negligent in not discovering this fact especially since the witness in question was in the custody of the Government under the Witness Relocation Program. (Tr. 59) *U.S. v. Cacciatore*, Supra. (Dissenting Opinion)

We respectfully submit the Government should not be able to thwart the intention of the "Plan" by requesting adjournment of a trial date when it knew or should have known its witness would be unavailable on the date set, and that the indictment should be dismissed.

POINT IV

Payment by the Government to witness informant violated due process.

The chief Government witness in this case was Jack Napoli a/k/a Jack Karingi, a man who admittedly made a living as a con man, counterfeiter and cigarette smuggler. (Tr. 57) In February of 1956 Napoli went to one of the defendants in this case, Herbert Jacobs, a jeweler, and told Jacobs that he was a friend of Russell Bufalino and wanted to buy some jewels. (Napoli and Bufalino had never met.) Napoli gave Jacobs a bad check for \$6,000.00 in exchange for the jewels. (Tr. 66) After Napoli had swindled Jacobs out of approximately \$25,000.00 worth of jewels by claiming to be a friend of Russell Bufalino, he (Napoli) went to the FBI for help. The FBI did not suggest that Napoli return the stolen jewelry to Mr. Jacobs, but rather they employed Mr. Napoli in their investigation of the alleged extortionate manner in which Mr. Jacobs sought the return of his property and more specifically, it is submitted, to obtain sufficient information to arrest and convict Russell Bufalino.

In exchange for his cooperation in this case, Napoli who had four charges pending against him in New Jersey for grand larceny and one charge in Florida for possession of a stolen driver's license was assured the Government would intercede in these cases to "talk" for him that is to make known his cooperation in order to obtain a less severe sentence. (Tr. 59) In addition, the Government promised to place Napoli, his wife and her children in the Witness Relocation Program with all its accoutrements including a monthly subsistence in excess of \$1,000.00, a change of identity and all expenses paid. (Tr. 59-60, 509) In this case, admission into the program, meant a total payment to Napoli in excess of \$46,000.00 within an approximate one year period. (Tr. 486) In order to obtain the maximum benefits under this program, Napoli perjured himself

before the Grand Jury, testifying he was married to his then girlfriend so she also could be included in the program. (Tr. 389, 392)

It is submitted these substantial payments within such a short period of time in and of themselves are tantamount to a bribe and are so outrageous and shocking to the conscience of a civilized society as to constitute a violation of due process under *Rochin v. California*, 342 U.S. 165, 96 L. Ed. 183 (1952) and *U.S. v. Russell*, 411 U.S. 423, 36 L. Ed. 2d 366 (1963). Moreover, the benefits conferred upon Napoli did not cease here.

While in the Witness Relocation Program, Napoli apparently was not satisfied with the money he was receiving so he submitted phony medical expense vouchers to the Marshal's Service for payment and in fact received payment on these vouchers. (Tr. 69) Despite the fact he defrauded the United States Government and in effect bit the hand that was feeding him, no charges were brought as a result of this incident.

The Government relocated Napoli and changed his identity, shielding him from those authorities attempting to process criminal charges against him. (Tr. 508, 514) Consequently, the Government provided Napoli with a fertile new pasture and unleashed this self-proclaimed con man, forger, counterfeiter and smuggler on an unwary and unsuspecting public.

While in the program, Napoli did not feel compelled to change his ways. When relocated to California, Napoli swindled another jeweler by passing a bad check in the amount of \$2,000.00. (Tr. 416, 417, 650 & 662) Napoli used his new identity and the "protection" afforded by the Marshal's Service to its utmost advantage. Declaring himself to be an employee of the U.S. Dept. of Justice (for 11 or 12 years), with a salary ranging from \$1,000.00 to \$2,500.00 per month, Napoli obtained substantial loans from at least three banks. He used the U.S. Marshals

assigned to protect him as credit references. The marshals involved even went so far as to assist him in acquiring the loans by providing false information to the banks to support Napoli's applications. (Tr. 318, 418, 666, 667, 676, 748 and 749) These loans were never repaid nor was restitution ever made to the California jeweler either by Napoli or the Government.

In *U.S. v. Russell*, Supra, pp. 431-437, the Supreme Court by Justice Rehnquist stated:

"We may someday be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the Government from invoking judicial process to obtain a conviction."

It is submitted that this is such a situation. At least five of the current members of the Supreme Court continue to adhere to the statement of Justice Rehnquist in *Russell*, Supra. (See *Hampton v. U.S.*, 425 U.S. 484, 48 L. Ed. 2d 113 (1976).

In *Rochin v. California*, Supra, a case involving an attempt by Government agents to obtain evidence by pumping the defendant's stomach, the Supreme Court held that the conduct of Government agents was so "fundamentally unfair" so "shocking to the conscience of a civilized people" and so "in conflict with the deeply rooted feelings of the community" as to require dismissal of the charges.

In *Williamson v. U.S.*, 311 F. 2d 441 (5th Cir. 1962), the court of appeals exercised its supervisory powers and reversed the conviction of the defendants because the Government informant was paid \$300.00 on a contingent fee basis. Judge Brown in a concurring opinion explained that the reversal was required because "the means used to 'make' the case are essentially revolting to an ordered society".

The conviction in this case does not justify the means used by the Government. The man to whom the Government paid over \$46,000.00 was described by the trial court as a "bum" and "thief" (Sentencing 9) a "self-conceited liar to an extent never before seen by this court" (Tr. 428) and a "congenital liar" (Tr. 272). He is an admitted perjurer (Tr. 389) and space does not permit a review of the dozens of frauds and forgeries he perpetrated. (Tr. 57-58 & 256) Suffice it to say he has instituted false criminal charges against innocent individuals (Tr. 278), he has stolen mortgage money from his father-in-law (Tr. 329) and he has even lied to the FBI about the way he obtained the jewels in the case. (Tr. 387) If there ever was a witness that a court could as a matter of law say was completely unbelievable, this would be that witness. Yet the Government paid this individual \$46,000.00, assisted him in providing false information to a number of banks to obtain substantial loans and did nothing when while on the program he defrauded both the Government and the citizens of the community in which he was relocated.

To allow the Government to "purchase" testimony with the type of benefits conferred upon Napoli in this case; to allow the Government to release this type of individual in a community where he could and did defraud innocent and unsuspecting citizens; to allow the Government to participate in that fraud by providing false information to obtain loans for Napoli which were never repaid and to allow the Government to do this in the prosecution of a single crime less significant than the multitude of crimes perpetrated by the witness and in the prosecution of defendants whose criminal records are much less significant than the admitted criminal activity of the witness, is truly conduct so outrageous and shocking to the sensibilities of a civilized society as to violate due process under *U.S. v. Russell*, *Supra*, and *Rochin v. California*, *Supra*.

This is at least the fourth time the Government has used the Witness Relocation Program to obtain testimony

against Mr. Bufalino. (The previous cases resulted in acquittals.) It is fundamentally unfair to allow the Government to continue to use its vast resources including the direct payment of substantial sums of money to obtain the testimony of inherently unbelievable witnesses in the prosecution of a single individual. It is as if the Government has placed a bounty on Mr. Bufalino's head offering to confer all the benefits of the Witness Relocation Program on any individual who will testify against him. It is submitted that the circumstances surrounding the employment of Napoli in this case are substantially more egregious than the \$300.00 contingent fee which the 5th Circuit condemned in *Williamson v. U.S.*, *Supra*.

Although specific objections to the prosecution on the basis of due process were not made in the court below, in *U.S. v. Cuomo*, 479 F. 2d 688 (2nd Cir. 1973), this court stated:

"However in as much as the constitutional argument raised in this case depends solely on a question of law, that is whether the prosecution's conduct is so 'shocking' as to constitute a violation of the defendant's right to due process, we discuss it even though the issue was not raised in the first instance in the court below."

In conclusion, it is submitted the conduct of the Government in this case was so outrageous as to violate fundamental fairness and the court by application of the due process clause or by exercising its supervisory powers should reverse the conviction and dismiss the charges against the defendants.

POINT V

The Court erred in refusing to suppress the Nagra tapes and the testimony of Jack Napoli.

The defendant filed a timely motion to suppress all evidence with respect to the conversations of April 12, April 16 and April 20, 1976 between Jack Napoli and the defendants. (A50 to A55) The evidence in question is the Nagra recordings and the testimony of Jack Napoli relative to those conversations.

On the dates aforementioned, the FBI placed a Nagra tape recorder and K.E.L. transmitter on the person of Jack Napoli. On each date, recordings were produced on the Nagra body unit and from the K.E.L. transmissions. The Nagra recordings were admitted into evidence at trial. Recordings made from the K.E.L. transmissions were deliberately destroyed by FBI Agent Edwards prior to trial and prior to review by the defense. (Hr. Tr. 80)

These K.E.L. recordings were discoverable both as recorded statements of the defendant under Rule 16 A (1) (a) of the Federal Rules of Criminal Procedure and as Napoli *Jencks* material under 18 U.S.C. Section 3500. Further, the K.E.L. recordings may have constituted exculpatory material and their preservation and release to the defense required under *Brady v. Maryland*, 373 U.S. 83 (1963).

Since access to these classes of evidence is a basic requirement of constitutional due process, the Government has an affirmative duty to preserve such evidence even prior to the indictment. The duty of preservation was explained in the case of *U.S. v. Bryant*, 439 F. 2d 642, 651 (D.C. Cir. 1971), wherein the court stated:

“The duty of disclosure attached in some form once the Government has first gathered and taken possession of the evidence in question. Otherwise, disclosure

might be avoided by destroying vital evidence before prosecution begins or before defendants hear of its existence. Hence we hold that before a request for discovery has been made, the duty of disclosure is operative as a duty of preservation."

Agent Edwards, by destroying the K.E.L. transmission tapes, violated this duty of preservation and usurped the judicial function of determining what evidence is relevant and producible in a criminal case. *U.S. v. Harris*, 543 F. 2d 1247 (9th Cir. 1976).

The Government's response that the destruction of the K.E.L. recordings was harmless since they would not have been useful to the defense at trial, is not convincing since it is not for the Government to decide what material could be used effectively by the defense. Rather, the defense must be given wide latitude in its individualized development of all useful evidence to the best advantage. *Goldberg v. U.S.*, 96 S. Ct. 1338, 1348 n.21 (1976).

Napoli's credibility was hotly contested during trial. The Nagra body recordings admitted during trial were subject to Napoli's exclusive custody and control both during the conversations in question and afterwards. The K.E.L. recordings contained simultaneous transmissions of the conversations to recorders in the possession of the FBI. They therefore represented the only evidence of these conversations free from the possibility of tampering by Napoli. Their importance is emphasized by the fact that these three conversations represent the most damaging evidence in the case against the defendant.

Agent Edwards admitted that portions of the K.E.L. recordings were audible. (Hr. Tr. 111, A65) He also admitted he could not be certain the inaudible portion of the Nagra recordings were not audible on the K.E.L. recordings. (Hr. Tr. 146-147; A65) The destroyed re-

cordings cannot therefore be treated as if they were mere duplicates of the Nagra recordings, rather, they could have contained a more accurate representation of the conversations if Napoli had in fact tampered with the Nagra recordings or a more complete representation if they contained a portion of the conversations not audible on the Nagra recordings. Unfortunately, the actions of Agent Edwards have prevented both the court and the defense from determining the true value of the K.E.L. recordings.

Because the destruction of the K.E.L. tapes was deliberate and unnecessary and because of their potential value in the preparation of a defense, the sanctions imposed by the *Jencks* Act are entirely appropriate in this case. The deliberate destruction of the K.E.L. tapes requires suppression of the Nagra tapes and of Napoli's testimony regardless of the motive for destruction, and the lower court's failure to grant the Defendant's motion to suppress is reversible error. *U.S. v. Carrasco*, 537 F. 2d 372 (9th Cir. 1976); *U.S. v. Lonardo*, 350 F. 2d 523 (6th Cir. 1965); and *Lee v. U.S.*, 368 F. 2d 834 (D.C. Cir. 1966).

In *U.S. v. Miranda*, 506 F. 2d 1319, 1328 (2nd Cir. 1975), a case dealing with the inadvertent and negligent loss of K.E.L. transmitted tape recordings, this court distinguished an inadvertent loss from a deliberate destruction of *Jencks* material stating:

"This is not a case of intentional, deliberate or bad faith loss or suppression of evidence by Government agents in which prophylactic sanctions against the Government would be appropriate."

Since this case involves the deliberate destruction of tapes as opposed to the inadvertent or negligent destruction referred to in *Miranda*, Supra "prophylactic sanctions" are appropriate.

The lower court in the instant case although refusing to grant the suppression motion, warned the Government

that tapes of this sort should be preserved in the future stating:

"This disposition of the motion should not be interpreted as approval of the procedures employed here by Agent Edwards. Determinations as to the usefulness of tape recorded evidence containing Rule 16, 3500 and possibly *Brady* material are for the court and counsel, not the FBI. Whatever burden the preservation of extra reels or cassettes of tape may impose on the facilities of law enforcement agencies is vastly outweighed by both the defendant's interest in the preservation and availability of all evidence which might arguably prove useful to him and the public interest in minimizing the threat to an otherwise sound prosecution posed by such careless practices."

This warning is at best a hollow gesture. In order to assure due process in this case, and in order to assure future compliance with the requirements of law with respect to the preservation of this type of evidence, the lower court should have imposed the full sanctions of law and granted the defendant's motion to suppress. *U.S. v. Harrison*, 524 F. 2d 421, 434 (D.C. Cir. 1975).

POINT VI

The Court erred in failing to instruct the jury that they must find the defendant intended to instill fear in Jack Napoli in order to convict.

The trial court charged the jury:

"In deciding whether the defendants willfully made implied threats of physical harm or other criminal means to Jack Napoli, you should take into consideration all of the evidence in the case bearing on what a particular defendant intended by his statement . . ."
(A150)

The court further charged:

"You need only find that the defendant intended to threaten Jack Napoli with harm to his person . . ."
(A151)

Nowhere in the court's charge is the jury directed that they must find the defendant intended, by his threats, explicit or implicit, to instill fear in Jack Napoli in order to find the defendant guilty.

Acts or statements constitute a threat only if they instill fear in the person to whom they are directed or are reasonably calculated to do so in light of the surrounding circumstances. *U.S. v. Curcio*, 310 F. Supp. 351, 357 (D. Conn. 1970); *U.S. v. Natale*, 526 F. 2d 1160, 1168 (2nd Cir. 1975); *U.S. v. Sears*, 544 F. 2d 585, 588 (2nd Cir. 1976).

In *U.S. v. Natale*, the trial court charged the jury that the Government must prove from the evidence that:

"An ordinary person would have been put in fear of immediate bodily harm or future bodily harm from anything that the defendants said or did . . ." (at page 1168)

In *U.S. v. Sears*, this court approved the trial judge's charge which was as follows:

"Extortion as far as this statute is concerned includes any act or statement which constitutes a threat if it instills fear in the person to whom they are directed or are reasonably calculated to do so in the light of the surrounding circumstances." (at page 587)

The court went on to explain the sufficiency of the charge holding:

"It is not sufficient, however, in proving a violation of 18 U.S.C. Section 894 to show that a statement,

viewed objectively in light of the surrounding circumstances, would reasonably cause an ordinary person to become fearful. *Fear must be the intended result of the defendant's act.*" (Emphasis added)

(*U.S. v. Sears*, Supra, at page 588)

The trial court in the instant case never charged the jury that in order to convict, they must find that "fear must be the intended result of the defendant's act".

Although the defendant did not specifically object to the sufficiency of the court's charge, it is submitted that the "intent to instill fear" is an essential element of a violation of Section 894 (*U.S. v. Sears*, Supra), and the failure to charge on an essential element is plain error under Rule 52 (b) of the Federal Rules of Criminal Procedure. (*U.S. v. Natale*, Supra at p. 1167; *U.S. v. DeMarco*, 488 F. 2d 828, 832 (2nd Cir. 1973)).

POINT VII

The Court erred when it in effect charged the jury that they must find an extension of credit.

The Court in its charge to the jury on the issue of "extension of credit" stated:

"The fact that the debt or extension of credit in this case came about because Jack Napoli received jewelry from Mr. Jacobs without paying for it, does not prevent your finding an extension of credit." (A141)

Specific objection was made to this portion of the court's charge. (Tr. 802, 804, & A156) It is submitted the court by this charge directed the jury to find as a fact that Jack Napoli obtained jewelry from the defendant Jacobs removing that fact from consideration by the jury. Al-

though the court immediately after the language above quoted stated:

"I don't mean to tell you that you must find that there was an extension of credit."

The court by directing that the jury find Napoli obtained jewels from Jacobs in effect directed a finding of an extension of credit.

The plea of not guilty places every issue in doubt and not even undisputed facts may be removed from the jury's consideration either by direction or omission in the charge. *United Brotherhood of Carpenters and Joiners of America v. U.S.*, 330 U.S. 395, 408; 91 L. Ed. 2d 973 (1947); *Rowe v. U.S.*, 287 F. 2d 435, 440 (5th Cir.) Cert. denied 368 U.S. 824 (1961).

The case of *U.S. v. Natale*, Supra, is distinguishable since in that case the trial judge merely expressed his opinion that two of the elements of the crime were not in dispute. He specifically charged the jury on each and every element and did not direct a finding as to any element.

In the instant case, the court specifically directed a finding as to an essential element of the crime and therefore deprived the defendant of the benefit of his plea of not guilty and of the presumption of innocence, thus requiring a new trial.

POINT VIII

The Court erred in relying on substantial misinformation in the presentence report.

The basic theory on sentencing based on false assumptions was formulated by the U.S. Supreme Court in *Townsend v. Burke*, 334 U.S. 736 at 740-1, 92 L. Ed. 1690 (1948):

"Misinformation or misunderstanding that is materially untrue regarding a prior criminal record or

material false assumptions as to any facts relevant to sentencing, renders the entire sentencing procedure invalid as a violation of due process."

This Court held in *U.S. v. Robin*, 545 F. 2d 775 (2nd Cir. 1976), that where there is a possibility that sentence was imposed on the basis of false information or false assumptions concerning the defendant, the sentence will be vacated.

Before pronouncing sentence in *Robin*, Supra, the judge stated he was convinced the defendant was a trafficker in heroin. The Court held that the defendant was impaired at sentencing by inadequate preparation and that it was clear from defendant's repeated denials of the allegations in the presentence report that a serious question of accuracy was raised.

In the present case, the sentencing judge actually relied on the assumption that defendant was dealing in stolen diamonds. The judge stated:

"Moreover, the record of this case in my view logically reaches the conclusion that Mr. Jacobs and you were fencing diamonds or dealing in stolen diamonds since otherwise I can't see why you wouldn't have gone to the police to correct the debt from that." (A179)

* * *

"It seems to me that the combination of using force to collect a debt and of the background of dealing in stolen goods is too serious to be overlooked. I don't like the idea of depending in this sentence on what people have said which hasn't been proven although I would be less than candid if I said that anybody can completely disregard the fact that there are very strong reports, Mr. Bufalino, that you have been connected with organized crime all of your life." (A180)

Just as the Government tried to show in *Robin*, that defendant was a major trafficker in heroin, the Government tried to show here that defendant Bufalino was a trafficker in stolen diamonds and a major organized crime figure. (A171-A172) Reliance by the trial judge on such unsubstantiated reports invalidates the sentencing procedure. *U.S. v. Powell*, 487 F. 2d 325 (2nd Cir. 1973).

Exactly how far the sentencing judge should go in corroborating alleged misinformation has been discussed in *U.S. v. Needles*, 472 F. 2d 652 (2nd Cir. 1973) which involved a guilty plea to a charge of unregistered possession of a submachine gun in violation of the Federal Gun Control Act of 1968.

The defendant claimed there was no evidence to support allegations in the presentence report. The Court disagreed because of previous admissions made by the defendant, but stated:

"Perhaps in a case where defendant denied everything and there was a chance that an entire incident had been manufactured or that serious charges in the presentence report on which the judge sought to rely were completely false, we would require further corroboration even though the sentencing judge thought it unnecessary." (*U.S. v. Needles*, at page 658)

We do not dispute that the sentencing judge can take such matters into consideration but when he relies on the information in imposing sentence, there must be corroboration. The court in *Needles*, also discussed *U.S. v. Weston*, 448 F. 2d 626 (9th Cir. 1971) which was remanded for resentencing stating:

"On resentencing, the District Court may not rely upon information in the pre-sentence report unless it is amplified by information such as to be persuasive of the validity of the charge made."

The court stated that one of the factors distinguishing *Needles* from *Weston* was that in *Weston*, the defendant had no criminal record and the factual basis for the allegations in the presentence report rested on opinions of unidentified persons and statements of informers. Here, the defendant had no prior record and there was no factual basis at all to support the allegations that the defendant dealt in stolen diamonds or was involved in organized crime. Yet, the sentencing judge relied on these hollow accusations and sentenced the defendant to a prison term of four years when he had sentenced co-defendant Sparber, who had a prior record, to one year imprisonment and co-defendant Jacobs to a three year period of probation.

We respectfully submit the sentencing judge violated the defendant's right of due process by his reliance on material false assumptions contained in the presentence report. We therefore request the defendant's sentence be vacated.

POINT IX

The Court below erred in imposing separate sentences for the same offense.

Courts must look to Congressional intent to determine whether double punishment is authorized under specific Federal statutes. *Iannelli v. U.S.*, 420 U.S. 770, 43 L. Ed. 2d 616 (1975), *Jeffers v. U.S.*, — U.S. —, 53 L. Ed. 2d 168 (1977).

When Congress does not clearly define whether cumulative punishment is warranted, the doubt should be resolved in favor of lenity. *Bell v. U.S.*, 349 U.S. 81, 99 L. Ed. 905 (1955); *U.S. v. Ennons*, 410 U.S. 396, 35 L. Ed. 2d 379 (1973). In the present case, defendant was convicted of two counts under the same section of 18 U.S.C. Section 894. We are not dealing here with several dis-

inct statutes or sections. The intent of Congress is clearly not stated and is at best ambiguous. If Congress had intended separate punishment for conspiracy and the substantive offense under Section 894, different sections providing for separate punishment would have been enacted.

The court also looked to the intent of Congress in construing 21 U.S.C. Sections 846, 848. *U.S. v. Sperling*, 560 F. 2d 1050 (2nd Cir. 1977). The case involved a life sentence and a \$100,000.00 fine on a continuing criminal enterprise conviction and thirty years imprisonment and a \$50,000.00 fine on a conspiracy conviction.

The court stated in *Sperling* that the precise issue before the court was whether Section 846 and Section 848 were the *same offense* when they both arose out of a single conspiracy. The court looked to the *Blockburger* Test to determine whether cumulative punishment was warranted under Sections 846 and 848. *Blockburger v. U.S.*, 284 U.S. 299, 304, 76 L. Ed. 306 (1932). *Blockburger* simply states that where the same act constitutes a violation of two distinct statutes, if proof of one offense would necessarily prove the other, the imposition of cumulative punishment is not permitted.

The court in *Sperling* held that Section 846 and Section 848 met the *Blockburger* Test since a conviction on Section 848 requires proof of concerted activity with five or more persons. The court looked to the meaning of "concerted" in *Webster's New Collegiate Dictionary*, 233 (1976 Ed.) and found that "concerted" means "mutually construed or agreed on" or "performed in unison". The court went on to say at page 1055:

"We think it is too plain for cavil that to act 'in concert' to violate the law necessarily includes conspiracy to do so, and, hence, to prove the continuing criminal enterprise charge is to prove conspiracy."

The Court looked to Congressional intent to determine whether double punishment was warranted under Sections 846, 848, and at page 1056, the court stated:

"Thus Congressional intent to punish cumulatively both the conspiracy and the substantive offense is necessary to override the presumption that those conspiracies and substantive crimes which fall outside Wharton's Rule cannot be punished more than once."

Defendant in this case was convicted under a two count indictment charging violations of 18 U.S.C. Section 894. Count I charged that defendants, Russell Bufalino, Michael Sparber and Herbert Jacobs, "unlawfully, willfully and knowingly did combine, conspire, confederate and agree together . . . to violate Section 894 of Title 18, United States Code." Count II charges that defendants, Russell Bufalino, Michael Sparber and Herbert Jacobs "unlawfully, willfully and knowingly did use extortionate means . . . to collect extensions of credit."

Section 894 of Title 18, United States Code, reads in part as follows:

"(a) Whoever knowingly participates in any way, or conspires to do so, in the use of extortionate means

(1) to collect or attempt to collect any extension of credit, or

(2) to punish any person for the non-repayment thereof

shall be fined not more than \$10,000.00 or imprisoned not more than twenty (20) years or both."

We submit that punishing the defendant separately for convictions of conspiracy and the substantive offense under

18 U.S.C. Section 894 is violative of the double jeopardy provisions of the Fifth Amendment of the United States Constitution.

In *Sperling*, Supra, the court looked to the definition "concerted action". In Section 894, one must "knowingly participate" or "conspire" to violate the statute. "Participate" is defined by WEBSTER'S NEW TWENTIETH DICTIONARY OF THE ENGLISH LANGUAGE (World Publishing Company, 1964), as follows: "to have or take a part or share with others (in some activity, enterprise, etc.)".

Defendant was sentenced twice for the same offense. Proof that defendant knowingly conspired to violate Section 894 necessarily proves that defendant participated in a violation of said statute.

In *U.S. v. DeStafano*, 429 F. 2d 344 (2nd Cir. 1970), this court stated that a defendant could be charged with a conspiracy to participate in and participation in the use of extortionate means to collect an extension of credit. The court relied on *Callanan v. U.S.*, 364 U.S. 587, 5 L. Ed. 2d 312 (1961).

Callanan involved the Hobbs Anti-Racketeering Act, 18 U.S.C. Section 1951, which proscribes obstruction of commerce by extortion to do so. The Petitioner argued that by combining conspiracy and the substantive offense into one statute, Congress intended not to punish the two offenses separately. The court, finding no aid in the legislative history of the act to determine Congressional intent, held that the defendant could be punished separately. However, the present case can be distinguished from the *Callanan* decision since the statute involved in *Callanan*, included separate sections for conspiracy and the substantive crime before it was amended to include the two offenses in one section. The Reviser's note to 18 U.S.C. Section 1951 at page 168 indicates that the changes in phraseology and arrangement were necessary to effect consolidation. A Congressional intent to treat the conspiracy

and substantive crime separately under 18 U.S.C. Section 1951 could be implied from the prior wording of the statute. No such implication can be made under 18 U.S.C. Section 894.

Another distinguishing factor between *Callanan*, and the present case lies in the wording of 18 U.S.C. Section 1951 (a) which does not include the words "participates in" as does 18 U.S.C. Section 894.

Assuming Congressional intent to punish separately for conspiracy and the substantive offense under 18 U.S.C. Section 894 could be found, this Court should employ the "same evidence test" to prohibit double punishment. *U.S. v. Austin*, 529 F. 2d 559 (6th Cir. 1976); *Freeman v. U.S.*, 146 F. 2d 978 (6th Cir. 1945). The acts alleged under Count I and Count II of the indictment are one and the same, and indeed the prosecution used the same evidence to prove both counts.

We respectfully submit that defendant, Russell Bufalino, was denied his Fifth Amendment right against double punishment. We ask that defendant's sentence on Count I be vacated consistent with the opinion in *Sperling*, *Supra*.

POINT X

The evidence was insufficient to sustain a conviction of the defendant Bufalino on either count of the indictment.

The defendant in this case is charged with conspiracy to violate 18 U.S.C. Section 894 "Collection of Extension of Credit by Extortionate Means" and with the substantive violation of this section. The defendant contends the evidence is insufficient to sustain the conviction in that it fails to show there was an extension of credit within the meaning of the Act; that there was any threat made by the defendant Bufalino which was intended to instill fear in the victim, Napoli, and that any threat that may have been

made was for the purpose of collecting an extension of credit.

The Government contends there was an extension of credit in this case when Napoli on four separate occasions obtained jewelry from the defendant Jacobs. On the first occasion Napoli obtained jewelry by giving Jacobs a bad check for \$6,000.00. (Tr. 67) On the second occasion, Napoli obtained jewelry on trial stating he would call Jacobs if he intended to keep it. (Tr. 70) On the third occasion, Napoli's brother went to Jacobs and obtained a ring, (Tr. 73) and on the final occasion Napoli himself got a ring by "signing for it". (Tr. 83) On all occasions, Napoli was able to obtain jewelry from Jacobs by posing as a friend of the defendant, Russell Bufalino. (Tr. 62)

The statute in question is commonly known as the "Loan Shark Act" and was meant to apply to members of a class "which engage in extortionate credit transactions". *Perez v. U.S.*, 402 U.S. 146, 149, 153, 28 L. Ed. 2d 686 (1971).

In this case, there was no credit transaction in the sense of a formal loan with a specific interest rate. This was not a "loan sharking" operation and therefore not in the "class of activities" meant to be regulated by the statute. *Perez v. U.S.*, Supra at p. 153; See also *U.S. v. Robbins*, 510 F. 2d 301 (6th Cir. 1975), where the District Court granted a motion for acquittal because a gambling debt was not an extension of credit under this Act.

Since all criminal statutes must be strictly construed and any ambiguity resolved in favor of the defendant, it is submitted that a strict construction of Section 894 prohibits the inclusion of the transactions in this case within the meaning of the term "extension of credit". *U.S. v. Ennoms*, Supra.

The second point on which the evidence in this case is insufficient is that considering the circumstances surrounding the April 12, 1976 conversation between the defendant Bufalino and Napoli, no reasonable man could conclude

that the defendant Bufalino by his actions or words intended to frighten Napoli. Such a finding is essential to a conviction under this section. *U.S. v. Sears, Supra*; *U.S. v. Natale, Supra*.

At the time of this conversation, the defendant Bufalino was seventy-four years of age, five foot eight and one-half inches tall and weighed approximately one hundred seventy-five pounds. He was blind in one eye and had one and one-half fingers missing from one hand. (See presentence report) Napoli was thirty-six years old (Tr. 56), over six feet tall and weighed over two hundred pounds. The conversation in question occurred at the Vesuvio Restaurant, a public eating place in New York City. The conversation as testified to by Napoli and as contained in Government's "Exhibit 1-a" was in essence that Bufalino told Napoli that if he (Napoli) didn't do the right thing, he (Bufalino) would kill him himself. (Tr. 122) In view of the respective ages and sizes of the individuals involved and the fact that the conversation occurred in a public place, a reasonable man could not find that Bufalino's statement was meant to instill fear in Napoli.

The final point on which it is submitted the evidence is insufficient is that the record in this case reveals the actions of Bufalino towards Napoli were not for the purpose of collecting an extension of credit.

Napoli used Bufalino's name to "rip-off" Herbie Jacobs. (Tr. 362) A review of the conversations and meetings between Bufalino and Napoli shows that Bufalino's primary concern was the misuse of his name. He wanted Napoli to return the merchandise not because he was collecting a debt for Jacobs but because he wanted his name cleared. During the first meeting in Florida, Napoli testified "he (Bufalino) asked me why I used his name to get the merchandise". (Tr. 94) During the conversation of

April 12, 1976, Napoli described his conversation with Bufalino as follows:

"He had—he told me—he said that if I don't do the right thing here, that he was going to kill me, he was going to kill me himself; that he was going to go to jail just for me. I told him 'I'll straighten it out I'll pay it.'

He said, 'You better'. Then he said, 'You got no reason to do this to me.' " (Tr. 122)

The tone of this conversation is not that of a loan shark trying to collect a debt, but rather is that of a man angered by the misuse of his name. There is no evidence in the record that Bufalino was to receive any benefit for collection of this "debt".

As stated previously, Section 894 must be strictly construed. Since the primary purpose of the words and actions of Bufalino were not to collect a debt, it is submitted that his conduct was not of the type meant to be punished under this statute.

Conclusion

Since both co-defendants have also appealed from the judgments of conviction, the defendant Bufalino wishes to incorporate in this brief by reference any arguments made by those defendants on appeal which may also pertain to Mr. Bufalino but which are not explicitly contained herein.

For the reasons set forth above, the appellant requests that the judgment of conviction be reversed; the verdict of guilty vacated and the defendant be discharged. In the alternative, the appellant requests a new trial be granted.

Respectfully submitted,

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CHARLES P. GELSO
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(62395)

Due and timely service of **TWO** copies
of the within **BRIEF** is hereby
admitted this **19TH** of **DECEMBER** 1977.

.....
Attorney for **APPELLATE**

*Mr. Robert H. [unclear]
Secy. Appellate
Section*

